UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES PITNER, Petitioner, v. ALICE PAYNE, Respondent.	CASE NO. C05-1646-TSZ-MAT REPORT AND RECOMMENDATION

INTRODUCTION

Petitioner is a Washington state prisoner who is serving a 102-month sentence for second degree rape of a child. Petitioner has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, contending chiefly that his retrial after an initial mistrial violated the Double Jeopardy Clause of the U.S. Constitution. After considering the petition, respondent's answer, petitioner's response, and the balance of the record, the court recommends that the petition be denied with prejudice.

BACKGROUND

The Washington Court of Appeals summarized the facts in petitioner's case as follows:

The State charged James Pitner with rape of a child in the second degree for conduct involving his 13-year-old daughter, D.P. Pitner filed a motion in limine to prevent the State from admitting evidence that he had been charged and acquitted in 1991 and 1999 with child sex offenses not involving D.P. The State agreed to the motion, and the trial court granted it.

During the trial, the defense called Candy Ashbrook, a child interview specialist who interviewed D.P., to testify for the purpose of impeaching D.P.'s testimony. Following Ashbrook's interview with D.P., she generated an 11-page report in a question and answer format. During Ashbrook's testimony, she repeatedly testified from her report by reading directly from it. In cross-examining Ashbrook, the prosecutor instructed Ashbrook to read from her interview transcript, which included a statement referencing Pitner's past charges. The prosecutor asked Ashbrook the following questions:

Q: And going to page six. Okay, counsel elicited from you that you asked the question, "Has anything else happened with your dad?"

A: Yes.

Q: And [D.P.'s] response was, "No, it always happened on a Sunday night always when Carolyn's gone, when she's at work." Correct?

A: Yes.

Q: And then you asked, "how [l]ong have your dad and Carolyn been together?"

A: Yes.

Q: And her response was, "Four years. Anyway – " and can you read from there starting with the "four years" response, what was her response?

A: "Anyway, there was one time when he was giving me a massage, it was one of the first nights after I moved in there in April on a Sunday. He was giving me a back rub, and he had my shirt off, and the light was off, so he said that he wouldn't be able to see me, so he turned the light off, and he asked if I wanted him to rub my legs, and I said no, and he said why – " do you want me to continue?

Q: Please.

A: Okay. "Why, are you afraid I'll rape you? Because he said people accused him of raping – "

> Pitner immediately objected and requested a mistrial because of the in limine violation. The court granted the motion.
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> Pitner then moved to dismiss the case, arguing retrial would violate his right against double jeopardy because the prosecutor's conduct was intentional. The court denied the motion, finding that although the prosecutor's conduct was negligent, it was not intentional. The court also denied his motion that a second trial would violate his right to a speedy trial. Pitner was retried and convicted as charged. This appeal followed.

State of Washington v. Pitner , 118 Wash. App. 1073 (2004), 2003 WL 22384092 (footnotes omitted) (Filed as part of State Court Record, Doc. #11, Ex. 10).

Petitioner appealed to the Washington Court of Appeals. The court affirmed petitioner's conviction in an unpublished opinion. (Doc. #11, Ex. 10). Petitioner sought review by the Washington Supreme Court. The court denied review. (*Id.*, Ex. 14).

On October 4, 2005, petitioner filed the instant petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Doc. #4). Respondent filed an answer, along with the state court record, on November 23, 2005. (Doc. #9). After receiving one extension of time, petitioner filed a response to the answer on March 1, 2006. (Doc. #15). The matter is now ready for review.

GROUNDS FOR RELIEF

Petitioner sets forth the following grounds for relief in his habeas petition:

1. Violation of Fifth Amendment Double Jeopardy Clause of the United States Constitution following mistrial.

2. Violation of Sixth Amendment right to a Speedy Trial.

(Doc. #4 at 6-7).

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DISCUSSION

Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's adjudication is *contrary to*, or involved an *unreasonable application* of, clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d) (emphasis added).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* In addition, a habeas corpus petition may be granted if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)

In *Lockyer v. Andrade,* 538 U.S. 63 (2003), the Supreme Court examined the meaning of the phrase "unreasonable application of law" and corrected an earlier interpretation by the Ninth Circuit which had equated the term with the phrase "clear error." The Court explained:

> These two standards, however, are not the same. *The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. It is not enough that a federal habeas court, in its "independent review of the legal question" is left with a "firm conviction" that the state court was "erroneous."* . . . [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.

Rather, that application must be objectively unreasonable.

538 U.S. at 68-69 (emphasis added; citations omitted). Thus, the Supreme Court has directed lower federal courts reviewing habeas petitions to be extremely deferential to decisions by state courts. *See Hall v. Director of Corrections*, 343 F.3d 976, 986 (9th Cir. 2003) (Tallman, J., dissenting). A state court's decision may be overturned only if the application is "objectively unreasonable." 538 U.S. at 69.

1. Petitioner's First Ground for Relief: Violation of Double Jeopardy Clause

Petitioner first contends that his second trial, following an initial mistrial, violated the Double Jeopardy Clause of the Constitution. The Double Jeopardy Clause dictates that no person may be "twice put in jeopardy of life or limb" for the same offense. U.S. Const. Amend. V.[1] The Clause protects a defendant against multiple punishments or repeated prosecutions for the same offense. *See United States v. Dinitz*, 424 U.S. 600, 606 (1976).

If, however, a second trial is the result of a mistrial that was requested by defendant, the Double Jeopardy Clause does not ordinarily apply. *See United States v. Tateo*, 377 U.S. 463, 467 (1964). Courts have reasoned that by seeking a mistrial, the defendant has waived his right to a verdict by that jury and thereby subjects himself to a second trial. *Id.* But in cases where the mistrial was the result of purposeful conduct by the prosecutor intended to goad the defendant into moving for a mistrial, courts have held that the Double Jeopardy Clause is implicated and a subsequent retrial may be barred. *See Oregon v. Kennedy*, 456 U.S. 667, 673-76 (1982). The

[1] The Double Jeopardy Clause applies to state prosecutions through the due process clause of the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 794 (1969), *overruled on other grounds, Payne v. Tennessee*, 501 U.S. 808 (1991).

focus in such an inquiry is on the prosecutor's intent in causing the mistrial, which may be inferred from objective facts. *Id.*

Petitioner contends here, as he did in his state court appeal, that the prosecutor intentionally caused the mistrial at his first trial, and that his second trial was therefore a violation of the Double Jeopardy Clause. However, as the state court reasonably found, the record does not support an inference that the prosecutor intended to provoke a mistrial:

> First, the State had no reason to induce a mistrial. It agreed with the defendant's pretrial motion to exclude evidence and references to his prior charges, and the case had not been going badly or unexpectedly against the State. Second, there was no indication that a second trial would have been advantageous to the State. Third, the evidence [leading to the mistrial] came out on cross-examination, rather than on direct with a witness prepared by the State. Fourth, the circumstances of the conduct were consistent with the prosecutor's explanation that she had not read far enough ahead in the witness' transcript to realize that inadmissible evidence was what the witness would refer to next. . . . Fifth, the State did not seek to admit any other inadmissible evidence during the trial, and it had avoided references to the excluded evidence even though some witnesses were aware of it.

(Doc. #11, Ex. 10 at 4).

Petitioner offers nothing to challenge these reasons in favor of finding that the mistrial was unintentional. His response to respondent's answer simply contends, without support, that the state court "refused to provide him with an opportunity to prove" that the mistrial was intentional.[2] (Doc. #15 at 2). Therefore, he has not shown the state court decision to be contrary to, nor an unreasonable application of, clearly established federal law, and his first ground for relief should be denied.

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[2] Petitioner's cryptic statement may be referring to the grounds that he raised in a *pro se* brief that he filed in his state court appeal. (Doc. #11, Ex. 7). However, the state court did address these additional grounds in the opinion affirming petitioner's conviction. (*Id.*, Ex. 10 at 6-7). The court found the grounds meritless. (*Id.*)

2. Petitioner's Second Ground for Relief: Violation of Right to a Speedy Trial

Petitioner's second ground for relief is based upon his Sixth Amendment right to a speedy trial. Petitioner appears to contend that the gap between the end of his first trial and the start of his second trial – a period of approximately 120 days – violated this right. (Doc. #4 at 7).

Respondent argues in response that petitioner failed to present this claim as a constitutional claim to the Washington Supreme Court and that the claim is now procedurally barred. (Doc. #9 at 6-8). As a result, respondent asserts that the claim is not cognizable on habeas review.

In order to present a claim to a federal court for review in a habeas corpus petition, a petitioner must first have presented that claim to the state court. *See* 28 U.S.C. § 2254(b)(1). This "exhaustion requirement" has long been recognized as "one of the pillars of federal habeas corpus jurisprudence." *Calderon v. United States Dist. Ct. (Taylor)*, 134 F.3d 981, 984 (9th Cir., 1998) (citations omitted). Underlying the exhaustion requirement is the principle that, as a matter of comity, state courts must be afforded "the first opportunity to remedy a constitutional violation." *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981).

In addition, a petitioner must not only present the state court with the *first* opportunity to remedy a constitutional violation, but a petitioner must also afford the state courts a *fair* opportunity. *Picard v. Connor*, 404 U.S. 270 (1971); *Anderson v. Harless*, 459 U.S. 4 (1982). It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. *Harless*, 459 U.S. at 6. "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

Finally, a petitioner must raise in the state court all claims that can be raised there, even if the state court's review of such claims is purely discretionary. *See O'Sullivan v. Boerkel*, 526 U.S. 838, 841-47 (1999). In other words, a petitioner must invoke one complete round of a state's established appellate review process, including discretionary review in a state court of last resort, before presenting their claims to a federal court in a habeas petition. *Id.* at 842-44. Thus, in Washington state, a petitioner must seek discretionary review of a claim by the Washington Supreme Court in order to properly exhaust the claim and later present it in federal court for habeas review.

After reviewing the state court record, the court finds that petitioner did not present his speedy trial claim as a federal claim when he filed his petition for review with the Washington Supreme Court. (Doc. #11, #x. 13 at 12). In the petition for review, petitioner merely argued that the delay violated his rights under state rule of criminal procedure CrR 3.3. (*Id.*) Consequently, petitioner failed to properly exhaust this claim. In addition, because more than one year has passed since his conviction became final, petitioner is now procedurally barred by state statute from raising this claim in state court. *See* RCW 10.73.090.

When, as here, a petitioner has procedurally defaulted on a claim in state court, the petitioner "may excuse the default and obtain federal review of his constitutional claims only by showing cause and prejudice, or by demonstrating that the failure to consider the claims will result in a 'fundamental miscarriage of justice.'" *See Noltie v. Peterson,* 9 F.3d 802, 806 (9th Cir. 1993) (citing *Coleman v. Thompson,* 501 U.S. 722 (1991)). Petitioner has failed to show, or even argue,

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that "cause and prejudice" exist excusing his default on the unexhausted claim.[3] Nor has he shown that failure to consider the claims will result in a miscarriage of justice. Accordingly, petitioner's second ground for relief is barred from federal habeas review and should be denied.

CONCLUSION

For the foregoing reasons, petitioner's petition for a writ of habeas corpus should be denied with prejudice. A proposed Order reflecting this recommendation is attached.

DATED this 29th day of March, 2006.

Mary Alice Theiler
United States Magistrate Judge

[3] In fact, it appears that petitioner may have abandoned his second ground for relief. In his response to respondent's answer, petitioner does not mention the speedy trial claim and affirmatively states: "This habeas case involves one issue: whether retrial of [petitioner] violated [the] Double Jeopardy Clause." (Doc. #15 at 1).